SURIYATI TAKRIL

v.

MOHAN GOVINDASAMY & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL APPEAL NO: 12-21-1999]
29 JANUARY 2000

ROAD TRAFFIC: *Negligence - Road accident - Liability - Respondent's inconsistent versions to appellant/victim's consistent versions - Whether trial court's finding of equal liability proper - Whether oral evidence could be admitted to construe respondent's inconsistent versions - Whether trial court justified in invoking s. 114(g) Evidence Act 1950 against appellant*

DAMAGES: *Quantum - Road accident - Pain and suffering and loss of amenities - Award of RM30,000 on finding of equal liability - Whether finding based on misapprehended facts - Whether medical disabilities of victim taken into account - Whether sum of RM37,000 more appropriate*

DAMAGES: *Quantum - Road accident - Costs for future knee replacement surgery - Award sum of RM3000 for surgery at government hospital - Whether victim entitled to seek surgery at private hospital - Whether sum of RM11,000 recommended by two private specialists reasonable*

The 1st respondent was the servant of the 2nd respondent who was driving a motor lorry owned by the 2nd respondent and the appellant was driving a motorcycle when an accident took place between the parties concerned. The appellant claimed that she intended to turn right at a junction when she stopped as the traffic light showed red. The 1st respondent then collided into the rear of her motorcycle causing her to fall and sustain bodily injuries. The 1st respondent gave two versions. In the police report lodged at the police station, he stated that the traffic light at the junction showed green in his favour and as he proceeded ahead he heard a loud collision only to stop and see the appellant's fallen motorcycle. Under cross-examination, however, he claimed that the light was red and that he had stopped, only to proceed when it had turned green whereby he then heard a collision and stopped when he saw the fallen motorcycle.

The trial court accepted the 1st respondent's version and construed that what the 1st respondent actually meant in the police report was that the light was not green when he arrived at the junction but that when it turned green he proceeded to turn right. Also, the trial court invoked s. 114(g) of the Evidence Act 1950 against the appellant for not calling the repairer of the motorcycle

and for not producing photographs showing the damage to the motorcycle. The trial court decided that both parties were equally liable and apportioned liability equally. The trial court then awarded a sum of RM30,000 for pain and suffering and loss of amenities and RM3000 for the appellant's cost of a knee replacement surgery at a government hospital although the appellant requested for the surgery at a private hospital.

Hence, the appellant's appeal.

Held:

[1] The appellant's version in the police report tallied with the version she gave under cross-examination whilst the 1st defendant gave two different inconsistent versions. Despite the different and inconsistent versions of the 1st respondent, the trial court leaned in his favour and rejected the appellant's consistent and unbroken version.

[2] The trial court was in error when it accepted the explanation of the 1st respondent to construe what he actually meant in the police report. That contravened s. 92 of the Evidence Act 1950 which excluded all parol evidence seeking to contradict or vary what was set out in writing. If there was an omission on the part of the 1st respondent to state a material fact in his police report, he should not add to his police report by way of an oral testimony.

[3] The trial court unjustifiably invoked s. 114(g) of the Evidence Act 1950 because (i) the trial court was not invited to do so; (ii) the parties had agreed in regard to the cost of damage to the motorcycle thereby obviating the necessity of calling a witness to merely prolong the hearing; and (iii) the appellant was not asked to call the repairer of the motorcycle to testify in court and to produce photographs showing the damage to the motorcycle, a basic requirement of s. 114(g), *ie*, evidence which **could be** and **is not** produced.

[4] In any factual dispute in regard to negligence on the road, no party can possibly demolish wholly the other party's version. Each party can only highlight the inconsistencies in the testimony of the opposite party and it is up to the court to examine, decipher and weigh the testimony of both parties and to decide accordingly. In this case, after reading the appeal record, the court found that the printed evidence favoured the appellant. It followed that the 1st respondent was wholly liable for the road accident and the order of the trial court should be set aside.

[5] The trial court misapprehended the facts and failed to consider the medical disabilities of the appellant as a result of which the trial court made a "wholly erroneous estimate of the damage suffered". Therefore, after taking into account the element of overlapping when two or more injuries are sustained simultaneously, the court awarded a sum of RM37,000 to the appellant for pain and suffering and loss of amenities. The award of the trial court of RM30,000 under that head was set aside.

[6] In *Yaakub Foong Abdullah @ Foong Chin Siew v. Lai Mun Keong @ Lai Mun & Anor* it was held that an injured victim in a road accident is entitled to have himself treated in a private hospital if in all the circumstances that is not an unreasonable thing for him to do. In *Chong Kam Siong v. Herman Baharuddin* it was held that an injured victim of a road accident should be granted the same right to choose where and by whom he wishes to be treated. The court was of the view that the victim of a road accident need only show a semblance of reasonableness to be entitled to seek medical treatment at a private hospital.

[6a] The sum of RM11,000 as recommended by two private specialists for the costs of the appellant's knee replacement surgery in a private hospital was reasonable. Therefore, the court awarded the said sum to the appellant. The trial court's award of RM3000 for surgery at a government hospital was set aside.

[Appeal allowed with costs.]

Case(s) referred to:

Ah Mee v. PP [1967] 1 MLJ 220 ***(foll)***
Baker v. Market Harborough Industrial Co-operative Society Ltd [1953] 1 WLR 1472 ***(refd)***
Benmax v. Austin Motor Co Ltd [1955] AC 370 ***(refd)***
Blyth v. Birmingham Waterworks Co [1856] 11 Ex 781 ***(refd)***
Chew Soo Lan v. Ludhiana Transport Syndicate & Anor [1976] 2 MLJ 205 ***(foll)***
Chong Kam Siong v. Herman Baharuddin [1995] 2 CLJ 413 ***(foll)***
Davis v. Hassan [1967] Times 13 January ***(refd)***
Davies v. Powell Duffryn Associated Collieries Ltd [1942] AC 601 ***(refd)***
Eh Khan Sio Eh Dum v. Choo Chiu Nan [1981] MMD October [1991] ***(refd)***
Er Siew Keng v. Eng Thiang Lai [1990] 1 CLJ 488 ***(refd)***
George v. Ollukaran A [1975] K 163 ***(refd)***
Grant v. Sun Shipping Co [1948] AC 549
Harris v. Brights Asphalt Contractors Ld [1953] 1 QB 617 ***(refd)***
Lalta v. Majidunnissa 25 IC 749 ***(refd)***
Mathuri v. Gurcharan 16 IC 25 ***(refd)***
Mohamed Abdullah v. Chah Hea Seng [1980] 2 MLJ 282 ***(refd)***
Mohamed Ali v. PP [1962] 28 MLJ 230 ***(refd)***
Mohamad Mohamad Said & Anor v. Perianayagam & Anor [1972] 1 MLJ 67 ***(refd)***
Multar v. Lim Kim Chet & Anor [1982] 1 MLJ 184 ***(refd)***

Murugan v. Lew Chu Cheong [1980] 2 MLJ 139 ***(refd)***
Padmraj v. Gopikishen 56 IC 129 ***(refd)***
Pengarah Institut Penyelidikan Perubatan & Anor v. Inthra Devi & Anor [1987] 2 CLJ 420 ***(refd)***
Ramrati v. Dwarika A [1967] SC 1134 ***(refd)***
Rasidin Partorjo v. Frederick Kiai [1976] 2 MLJ 214 ***(refd)***
Siddeswar v. Bhubaneswaris A [1978] C 4 ***(refd)***
Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu [1999] 3 CLJ 188 ***(refd)***
Tan Sai Hong (widow) suing on behalf of herself and her 2 children as dependants of Chong Sey Kow, deceased v. Joremi bin Kimin & Anor (Tan Sai Hong (balu) wakil kepada harta pusaka Chong Sey Kow, simati – Third Party) [1997] 5 CLJ 614 ***(refd)***
Victor Alphonse Sebastian & Ors v. Lee Ah Leek [1987] 2 MLJ xxi ***(refd)***
Williamson v. Rover Cycle Co [1901] 2 IR 619 ***(refd)***
Yaakub Foong Abdullah v. Lai Mun Keong & Anor [1986] 1 CLJ 355 ***(foll)***

Legislation referred to:
Evidence Act 1950, ss. 92, 114(g)

Other source(s) referred to:
Courtroom Medical, Kalisch-Williams, vol 9, paras. 2.10, 10.60, 10.61

For the appellant/plaintiff - N Jegatheeson; M/s John Ang & Jega
For the respondent/defendants - Joseph Clemons; M/s Dass, Jainab & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Introduction

This was an appeal against the decision of the learned sessions court judge, Johor Bahru (hereinafter referred to as the "trial court") who held that in the motor vehicle accident both the parties were equally liable and apportioned liability equally. The trial court also awarded the following quantum:

(a) Pain and suffering and loss of amenities at RM30,000; and

(b) Cost of future surgery at RM3,000.

In the appeal record at p. 42 thereof, the trial court awarded cost of house help in the sum of RM1,200 on the basis of RM200 times six. But surprisingly, in the written judgment at p. 19 of the appeal record, the trial court refused to make any award for the cost of house help. Be that as it may, the trial court also awarded the usual interest and costs.

The appellant plaintiff was dissatisfied with the decision of the trial court and she lodged an appeal. The appeal was entirely focussed on the issues of liability and quantum. The quantum was centred on the awards pertaining to (a) and (b) as alluded to above.

The Agreed Statement Of Facts

This was amply set out in the appeal record particularly at p. 56 thereof. It was common ground that the road accident occurred on 15 April 1994 at about 4.45p.m. at the traffic light situated at simpang lebuhraya Pasir Gudang/Taman Perling and Skudai between motorcycle bearing registration number JBL 656 ridden by the appellant plaintiff and motor lorry bearing registration number WX 6855 driven by the first respondent defendant as the servant or agent of the second respondent defendant and that motor lorry was owned by the second respondent defendant.

The Crucial Evidence

In motor vehicle accidents, parties have a knack to advance divergent versions to propel their cases ahead of their foes. The present appeal was not an exception.

The appellant plaintiff's version tallied with the police report as seen at p. 68 of the appeal record. She testified that when she arrived at the junction on her motorcycle with the sole intention of turning right, the traffic light was showing red against her and so she stopped. Suddenly (in her police report, she described it as "dengan tiba-tiba"), the first respondent defendant while driving the motor lorry in question collided into the rear of the motorcycle thereby causing her to fall and she sustained bodily injuries. Under cross-examination, the appellant plaintiff stood her ground. She did not waiver nor falter nor change her version. She stuck to her story. It was put to the appellant plaintiff that the road accident happened when she together with the first respondent defendant were turning right and that the collision took place between the front right tyre of the motor lorry with that of the motorcycle amid she categorically denied such suggestions. The appellant plaintiff categorically stated under cross-examination that she did not agree to the suggestion that the police report was not true. In short, what she was saying was that her police report contained the truth. Pure and simple, the version of the appellant plaintiff was that she was knocked down from her motorcycle from the rear by the motor lorry driven by the first respondent defendant.

Apart from putting forward the version as to how the road accident took place when the appellant plaintiff took the stand as alluded to above, the first respondent defendant gave at least two other versions as to how the road accident had happened.

The first version can be seen in the police report that was lodged by the first respondent defendant as seen at p. 67 of the appeal record. In that police report, the first respondent defendant stated that when he arrived at the junction, the traffic light was showing green in his favour and as he crossed the traffic light while driving the motor lorry, he heard a sound indicating a collision. He then stopped the motor lorry and he saw the appellant plaintiff's motorcycle had fallen near the front side of the motor lorry that was driven by him. To be precise, this was what the first respondent defendant said in his police report:

> Masa ini saya tiada nampak apa-apa di depan, lampu isyarat panah warna hijau, saya pun berjalankan motor lori saya pandu, tiba tiba dengar bunyi macam kena langgar.

and the translation of that police report goes like this:

> At this time, I did not see anything in front, the traffic light arrow showed green, I then moved the motor lorry which I drove, suddenly I heard a noise like a collision.

The second version of the first respondent defendant can readily be seen in his examination-in-chief as reflected at p. 38 of the appeal record. This was what he testified:

> As I was approaching the traffic light to turn right, there were no vehicles in front. At this time the light was red. I stopped at the junction.

And he continued to testify and in his examination-in-chief at p. 39 of the appeal record, this was what he said:

> As the light turned green, I turned to the right and I then heard a sound and I stopped. I went and saw the lady – she had fallen off the motorcycle.

It was crystal clear that the second version was in sharp contrast with his first version as contained in his police report. This was a clear case where the police report was at variance with the evidence in court and it would be proper, in fact, the court was entitled to reject the second version on the authority of *Multar v. Lim Kim Chet & Anor* [1982] 1 MLJ 184, 185.

Again in his examination-in-chief, the first respondent defendant said that he would not have been able to notice a motorcyclist on his left as his motor lorry weighed 8 ton (see p. 39 of the appeal record). By this he must have meant that the motor lorry was bigger than the motorcycle.

Under cross-examination, as seen at p. 39 to p. 40 of the appeal record, the first respondent defendant testified that he has been a lorry driver for ten to fifteen years. He said that he was not afraid when he went to lodge the police report and that the police were not rude nor did the police frighten him. He said that his version in his police report was the exact version as to how the accident had happened. He too said that he could not see the motorcycle on his right. He testified that it was the front left tyre of the motor lorry that knocked the motorcycle which the appellant plaintiff was riding and this was in sharp contrast to the suggestion put forward to the appellant plaintiff by the first respondent defendant's counsel in his cross-examination that it was the front right tyre of the motor lorry that collided into the motorcycle that was ridden by the appellant plaintiff (see p. 37 of the appeal record). Under cross-examination, it was put to the first respondent defendant that his police report was true, but he disagreed with that suggestion. It was also put to the first respondent defendant that the appellant plaintiff who was astride on her motorcycle was in front of him when he stopped the motor lorry at the junction, and again the first respondent defendant disagreed with this suggestion. It was also put to the first respondent defendant that when he attempted to turn right, the motor lorry that was driven by him knocked into the appellant plaintiff who was in front at the material time, and once again the first respondent defendant disagreed with this simple suggestion.

In his re-examination, the first respondent defendant testified that he went to the police station on the same day of the road accident in order to lodge a police report. Indeed the police report as shown at p. 67 of the appeal record showed that it was lodged on 15 April 1994 at 5.00p.m. – exactly half an hour after the road accident and the episode must have been fresh in the mind of the first respondent defendant. He too testified under re-examination that what he meant in his police report by the traffic light being green in his favour was that when he took off the traffic light was green.

Surprisingly, in complete contrast to his examination-in-chief, he testified under re-examination that he would have been able to see the motorcycle on his left but nevertheless on that day he did not see any motorcycle at all. He too testified under re-examination that the road accident took place when he turned right and that the appellant plaintiff was not in front of him. Further, he said that the sound came from the left.

The Findings Of The Trial Court

Despite the different and inconsistent versions of the first respondent defendant, the trial court leaned in his favour and rejected the appellant plaintiff's consistent and unbroken version. This was what the trial court said:

(1) "In the present case, in the absence of any independent evidence it was impossible to determine which of the two versions was inherently improbable or probable" (see p. 15 of the appeal record). The trial court arrived at this conclusion without subjecting the available evidence to a minute examination. The trial court should have preferred the evidence of the appellant plaintiff as it was consistent with her police report whereas the first respondent defendant's versions were totally at variance and inconsistent with his police report.

(2) At the last line of the second paragraph of p. 15 of the appeal record, the trial court invoked s. 114(g) of the Evidence Act 1950 against the appellant plaintiff for not calling the repairer and for not producing the photographs showing the damage to the motorcycle because according to the trial court it would help the trial court to ascertain whether this was a rear collision. It must be emphasised that the trial court on its own volition invoked s. 114(g) of the Evidence Act 1950 despite the fact that the first respondent defendant's counsel never asked for the repair bills or the photographs to be produced, and despite the fact that the parties had mutually agreed on the repair cost of the motorcycle to be in the sum of RM1,000 (see p. 25 of the appeal record). At p. 35 of the appeal record it was recorded that:

> Agreed Special Damages – RM2,653.00.

and Mr. N. Jegatheeson, learned counsel for the appellant plaintiff, pointed out that the trial court was informed that special damages inclusive of the repair of the motorcycle had been agreed at RM2,653. Was there wilful withholding of evidence by the appellant plaintiff as found by the trial court? *Omnia praesumuntur contra spoliatorem*: if a person wrongfully withholds evidence, every presumption to his disadvantage consistent with the facts admitted or proved will invariably be adopted (*Williamson v. Rover Cycle Co* [1901] 2 IR 619). But, of course, this trite principle of law cannot be applied in all situations. As I said, counsel for the first respondent defendant did not demand the production of the repair bills or the photographs to be produced and no adverse presumption should be invoked. Whereas the courts in India in *Mathuri v. Gurcharan* 16 IC 25; *Lalta v. Majidunnissa* 25 IC 749; and *Padmraj v. Gopikishen* 56 IC 129 held that since the plaintiffs had an account book and did not bother to produce the said book in spite of repeated demands by the defendants who were relying on the said book, then there was a presumption that the entries in the said book were against the plaintiffs. But, the Indian courts too held opposite views in *Ramrati v. Dwarika A* [1967] SC 1134; *George v. Ollukaran A* [1975] K 163; and *Siddeswar v. Bhubaneswaris*

A [1978] C 4 when they refused to draw adverse inferences from non-production of account books when no attempts were made by the opposite parties to call for such accounts that were kept by the keepers of such account books. At the end of the day, it was entirely up to the court to invoke the adverse presumption depending on the facts of each case. The facts in the present appeal was certainly not suitable to invoke the adverse inference presumption under s. 114(g) of the Evidence Act 1950. I have more to say on this point in the later part of this judgment. Meanwhile, it was part and parcel of my judgment that there was no wilful withholding of evidence on the part of the appellant plaintiff. This was my judgment and I so hold accordingly.

(3) The trial court then proceeded to accept the first respondent defendant's version with all its inherent inconsistencies purely by mere inference that what the driver of the motor lorry meant in his police report "was not that the light was green when he arrived at the junction but that it was green when he started to turn right." With respect, the police report of the first respondent defendant clearly showed that when the driver of the motor lorry arrived at the junction the traffic light was already green and so he proceeded ahead. According to the evidence, by proceeding ahead the first respondent defendant was in fact turning to the right.

(4) The trial court was prepared to dismiss the appellant plaintiff's claim but for the concessions afforded by both the respondents defendants. This was what the trial court said (see p. 16 of the appeal record):

> In the result, I was minded to dismiss her claim. However, counsel for the defendant suggested that liability be apportioned equally as he took the view that the accident would not have happened if both parties had kept a proper look out.
>
> In view of counsel's concession, I hold that both parties are equally liable for the accident.

In my judgment, the trial court took the easy way out in assessing the issue of liability. There was no assessment of the available evidence in the way that has been done in this judgment. Negligence is purely a question of fact. It involves the quality of the evidence that has been adduced and the treatment of the evidence by the presiding judge. According to Lord Justice Willmer in *Davis v. Hassan* [1967] Times 13 January CA that every case of negligence and certainly every case of traffic accidents had to be decided on its own particular facts. And according to Lord du Parcq in *Grant v. Sun Shipping Co* [1948] AC 549, "a prudent man will guard against the possible negligence of others when experience shows such negligence to be common." Basically, negligence is said to be an omission to do something which a reasonable man

guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do: *Blyth v. Birmingham Waterworks Co* [1856] 11 Ex 781, 25 LJ Ex 212, 4 WR 204. Put in another way, negligence is a failure to exercise due care in a case in which a duty to take care exists. There was certainly a duty on the part of the first respondent defendant to exercise due care when he was approaching the traffic light bearing in mind that he was driving an 8 ton motor lorry. It was certainly a big motor lorry and this aspect of the factual matrix was not alluded to by the trial court at all.

The Power Of The Appellate Court

Wan Suleiman FJ speaking for the then Federal Court in the case of *Rasidin bin Partorjo v. Frederick Kiai* [1976] 2 MLJ 214 FC was of the view that it would be wrong for the appellate court which had not seen or heard the witnesses to substitute its own finding of fact for that of the trial judge. At p. 214 of the report, this was what his Lordship said:

> The learned judge had before him two conflicting versions given by witnesses for the plaintiff on the one hand and by witnesses for the defendant on the other.
>
> The learned judge found that the stretch of road where the accident occurred was tarred only in the middle, that the tarred part was 8 feet wide, enough to accommodate only one motor car or two motor cycles, that the accident occurred in the middle of the tarred section and applying the test in *Baker v. Market Harborough Industrial Co-operative Society Ltd* [1953] 1 WLR 1472 held that both motor cyclists were equally to blame.
>
> I am of the opinion that the appeal against the judge's finding that both motor cyclists were to blame should be dismissed. The evidence in support of each party's version was purely oral. It cannot be tested by independent evidence such as to be found in a police sketch plan (which by the time of the trial had been destroyed). The learned trial judge preferred the plaintiff's version to that of the defendant's, and in these circumstances, it would be wrong of us who have not seen or heard the witnesses, to substitute our own finding for that of the learned trial judge.

But, in the present appeal, the circumstances were quite peculiar. Here was a case where the decision of the trial court was not hinged on a specific finding of fact but rather a finding of facts which were really inferences drawn from a set of facts which the appellate court was at liberty to form an independent opinion as to the conclusion which should reasonably be drawn. Indeed there is a judicial authority to support this line of approach. Wan Suleiman FJ speaking for the then Federal Court in the case of *Mohamed Abdullah v. Chah Hea Seng* [1980] 2 MLJ 282 adopted the approach enunciated in *Benmax v. Austin Motor Co Ltd* [1955] AC 370 and held that (see p. 283 of the report):

> The decision of the learned judge was clearly not a specific finding of fact but a finding of facts which are really inferences drawn from facts specifically found, and on the principles enunciated in *Benmax v. Austin Motor Co. Ltd.*, [1955] A.C. 370 we feel more at liberty to form an independent opinion on the conclusion which should reasonably be drawn.

The Law Lords in *Benmax v. Austin Motor Co Ltd (supra)* wrote separate judgments and they unanimously dismissed the appeal but what these Law Lords said bear repetition. Thus, Viscount Simonds at p. 372 to p. 374 of the report had this to say:

> Fifty years ago, in *Montgomerie & Co. Ld. v. Wallace-James* [1904] A.C. 73, 75, Lord Halsbury L.C. said: 'But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an Appellate Court. And in *Mersey Docks and Harbour Board v. Procter* [1923] A.C. 253, 258-9: 39 T.L.R. 275, Lord Cave L.C. said: 'The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly.' It appears to me that these statements are consonant with the Rules of the Supreme Court, which prescribe that 'all appeals to the Court of Appeal shall be by way of rehearing' (R.S.C, Ord. 58, r. 1), and that 'the Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made' (r. 4). This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts. An example of this distinction may be seen in any case in which a plaintiff alleges negligence on the part of the defendant. Here it must first be determined what the defendant in fact did and, secondly, whether what he did amounted in the circumstances (which must also so far as relevant be found as specific facts) to negligence. A jury finds that the defendant has been negligent, and that is an end of the matter unless its verdict can be upset according to well established rules. A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent. This is a simple illustration of a process in which it may often be difficult to say what is simple fact and what is inference from fact, or, to repeat what I have said, what is perception, what is evaluation. Nor is it of any importance to do so except to explain why, as I think, different views have been expressed as to the duty of an appellate

> tribunal in relation to a finding by a trial judge. For I have found, on the one hand, universal reluctance to reject a finding of specific fact, particularly where the finding could be found on the credibility or bearing of a witness, and, on the other hand, no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the learned judge. But the statement of the proper function of the appellate court will be influenced by the extent to which the mind of the speaker is directed to the one or the other of the two aspects of the problem.

This was followed by Lord Morton of Henryton, who said at p. 374 of the report:

> Counsel for the appellant pointed out that the existence or non-existence of an inventive step is a question of fact decided in favour of the appellant by the trial judge, who had the advantage of seeing and hearing the witnesses. They suggested that your Lordships should hesitate long before overruling his decision. My Lords, this is an argument of great weight if the credibility of witnesses has come in question; but in the present case it would appear that the learned judge did not doubt the credibility of any witness, and formed his views by inference from the evidence as a whole. The Court of Appeal formed the opposite view by the same method and I agree with that court.
>
> My last observations were prepared before I had the privilege of reading in print the speech which has just been delivered from the Woolsack. It will be apparent from these observations that my views on the subject of appellate courts in no way differ from those which have just been expressed by my noble and learned friend, Viscount Simonds.

Then Lord Reid, in style, said at p. 375 to p. 376 of the report:

> Apart from cases where appeal is expressly limited to questions of law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimise the advantage enjoyed by the trial judge in determining any question whether a witness is or is not trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that: the trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is and should be slow to reverse any finding which appears to be based on any such considerations.

The authority which is now most frequently quoted on this question is the speech of Lord Thankerton in *Thomas v. Thomas* [1947] A.C. 484, 487-8; 63 T.L.R. 314; [1947] 1 All E.R. 582, and particularly the passage which I now quote: '1. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, and appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.'

Thomas v. Thomas [1947] A.C. 484 was a consistorial case based on cruelty, and I think that the whole passage which I have quoted refers to cases where the credibility or reliability of one or more witnesses has been in dispute, and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. If that be right, then I see no reason to doubt anything that was said by Lord Thankerton. But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion. In *Riekmann v. Thierry* [1896] 14 R.P.C. 105, 116 Lord Halsbury said: 'The hearing upon appeal is a hearing, and I do not think there is any presumption that the judgment in the court below is right.' And later in the same speech he said *Ibid*. 116-7: 'Upon appeal from a judge where both fact and law are open to appeal, it seems to me that the appellate tribunal is bound to pronounce such judgment as in their view ought to have been pronounced in the court from which the appeal proceeds, and that it is not within their competence to say that they would have given a different judgment if they had been the judge of first instance, but that because he has pronounced a different judgment they will adhere to his decision'.

Lord Tucker merely wrote a short one paragraph concurring judgment, while to cap it all up Lord Somervell of Harrow had this to say at p. 377 to p. 378 of the report:

> The advantages enjoyed by the trial judge have often been stated and are, I am sure, familiar to all appellate courts. The difficult cases are those where there are circumstances which appellant and respondent can each rely on. The judge has based his decision on the way in which witnesses give their evidence. Unless there is no dispute at all he always does this. On the other hand, there are sentences in his judgment which indicate very probably but not certainly that he did not have present to his mind an answer or document which plainly affects the accuracy of a witness he has relied on, or his general conclusion. I only refer to this in order to emphasise the impossibility in my opinion of laying down anything in the nature of a code as to the circumstances in which an appellate court should interfere either by reversing the trial judge or ordering a new trial.

Basically what these Law Lords were saying in *Benmax* could vigorously be applied to the factual matrix of the present appeal. These Law Lords said that there was a distinction between the finding of a specific fact and the finding of a fact which was really an inference drawn from the facts specifically found. In the case of the latter, the Law Lords were of the view that the appellate tribunal would more readily form an independent opinion than in the case of the former which involved the evaluation of the evidence of witnesses, particularly where the finding could be founded on their credibility or bearing.

At the end of the day, an appeal being a rehearing, the appellate court would generally be in a good position as the trial judge to evaluate the available evidence in printed form and the appellate court must not shrink from its responsibility in undertaking that onerous task although the appellate court ought to give some weight to the trial judge's opinion. It is salutary to remember that there cannot be any presumption that the judgment of the trial judge was right, such a presumption if it ever exists should be buried and remain buried forever in the abyss of darkness.

On the power of the appellate court, I had occasion to say in *Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu* [1999] 3 CLJ 188, 194 to the effect that:

> The appellate court is free to reverse the conclusions of the judge if the grounds given by the judge are totally unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in arriving at that decision the judge has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing together with the effect of the circumstances admitted or proved.

I have perused through the printed evidence with a toothcomb and the facts were fairly simple and straightforward. This was a case where the appellant plaintiff rode a motorcycle and stopped at a traffic light intending to turn to the right. The traffic light was red. As the appellant plaintiff was waiting for the traffic light to turn green, the first respondent defendant while driving an

8 ton motor lorry knocked the appellant plaintiff, who was astride on her motorcycle, from the rear. The appellant plaintiff fell and sustained injuries. Yet, on these simple facts the trial court failed to consider adequately the clear contradiction between the police report of the first respondent defendant which said that the colour of the traffic light was green when he arrived at the junction as opposed to his testimony in court when he said that it was red as he arrived at the junction. It must be borne in mind that the first respondent defendant lodged the police report half an hour after the road accident. Expediency in lodging the police report must be credited to him but the contents of that police report were detrimental to him. It showed that the traffic light was green and he then proceeded to take the right turn and it was at that point of time that the motor lorry collided into the rear portion of the motorcycle because in the words of the first respondent defendant:

> Tiba tiba dengar bunyi macam kena langgar.

and the translation would read as follows:

> Suddenly heard the sound, just like an accident.

Had the trial court considered the police report of the first respondent defendant in its correct perspective and read it against the evidence of the appellant plaintiff as a whole, an unmistakable conclusion would be arrived at in that the road accident was due to the negligence of the driver of the motor lorry wholly. It was pure and simple a collision from the rear and the sole author was the driver of the motor lorry, namely, the first respondent defendant. This was a case where the trial judge did not avail herself of the advantage of having seen and heard the witnesses when they took the stand in the witness box. As an appellate court, this court was entitled to evaluate the evidence by reading the cold print of the appeal record and give due weight to it accordingly.

As alluded to earlier, the first respondent defendant advanced three versions as to how the road accident had happened:

(1) That he together with the appellant plaintiff were turning right after the traffic light and the collision took place between the front right tyre of the motor lorry with that of the motorcycle. This version arose out of the cross-examination of the appellant plaintiff when it was put to her.

(2) As he arrived at the junction, the traffic light was showing green and he proceeded to drive the motor lorry past the traffic light and he then heard a sound indicating that there was a collision. This version was based on the police report lodged by him.

(3) As he was approaching the traffic light to turn right, there were no vehicles in front of him and at this point of time the traffic light was red and he stopped at the junction. As the traffic light turned green, he turned to the right and he then heard a sound and he stopped. He went and saw the lady – referring to the appellant plaintiff, who had fallen off the motorcycle. This was his version when he testified in court in his examination-in-chief.

These three versions showed the inconsistencies of the first respondent defendant's story and the trial court went on a frolic of its own when it pinned negligence based on the wrong inference of what the first respondent defendant meant in regard to his police report. When the first respondent defendant explained what he meant when he said that the traffic light was green in his police report, it was an exercise that contravened s. 92 of the Evidence Act 1950. That section excludes all parol evidence seeking to contradict or vary what was set out in writing. A classic example can be seen in the case of *Ah Mee v. PP* [1967] 1 MLJ 220 F.C. That was a case where the appellant had been convicted of rape. In the appeal it was argued, *inter alia*, that the complainant had clearly and unmistakably given the number of the appellant's car as M.7354 in her police report whereas in truth it should be M.6049. It turned out that M.7354 belonged to a motorised grass-cutter which had been defunct since 1957. The trial judge accepted her explanation of an honest mistake. On appeal, Ong Hock Thye FJ (as he then was) in delivering the judgment of the Federal Court succinctly said at p. 223 of the report:

> Section 91 of the Evidence Ordinance applies equally to criminal trials, no less than to civil proceedings, and it categorically states that 'in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms ... of such matter except the document itself.' The report was information relating to the commission of an offence which 'shall be reduced to writing' pursuant to section 107 of the Criminal Procedure Code (Cap. 6), and section 92 of the Evidence Ordinance goes on to exclude all parol evidence seeking to contradict or vary what was set out in writing. Hence it should have remained uncontradicted, on the prosecution evidence, that whoever might have raped the complainant it was certainly not this appellant, as owner of the vehicle M.7354. Not to put too fine a point on it, one might have thought an inadvertent transposition of one or two digits quite possible and probable due to genuine lapse of memory, but for the complainant to suggest that she could honestly have believed that '7354' bears any relation to '6049' passes all understanding.

Applying *Ah Mee*'s case to the present appeal, I am constrained to hold that the trial court was in error when it accepted the explanation of the driver of motor lorry in order to construe the meaning of the police report made by the said lorry driver. The ban contained in s. 92 of the Evidence Act 1950 is

all encompassing and it would certainly bar an embellishment of the police report. In my judgment, if there was an omission on the part of the first respondent defendant to state a material fact in his police report, he should not add to his police report by way of an oral testimony. The value of a police report has been alluded to by me in *Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu (supra)* as well as in the case of *Tan Sai Hong (widow) suing on behalf of herself and her 2 children as dependants of Chong Sey Kow, deceased v. Joremi bin Kimin & Anor (Tan Sai Hong (balu) wakil kepada harta pusaka Chong Sey Kow, simati – Third Party)* [1997] 5 CLJ 614 and I have nothing useful to add. In my judgment, the trial court should not have accepted the explanation of the first respondent defendant as to what he meant when he said that the traffic light was green. I am supported on this point by high authority emanating from the Federal Court in the case of *Chew Soo Lan v. Ludhiana Transport Syndicate & Anor* [1976] 2 MLJ 205 when Gill CJ (Malaya) said at p. 207 of the report to the following effect:

> The lorry driver did not say in his report to the police that the car had encroached onto his side of the road. His explanation for not doing that was that his report that the car knocked into his lorry meant that the car had encroached into his path. The driver of the car also made a report at about 9.30p.m. on the date of the accident. In his report he clearly stated that the lorry had encroached onto his side of the road. In the circumstances the learned judge ought not to have accepted the explanation of the lorry driver as to why he had not specifically mentioned in his report that the car encroached onto his side.

and I must therefore give effect to it accordingly.

I cannot help but observe that the trial court had abrogated the responsibility of making a finding of fact as to the issue of negligence by wrongly invoking presumptions of law without adequate grounds being established to justify it. In the present appeal, as I said earlier the trial court unjustifiably invoked s. 114(g) of the Evidence Act 1950 without any justification whatsoever. In short, the trial court erred in law in invoking that presumption because:

(1) the trial court, was not invited to do so;

(2) the parties had agreed in regard to the cost of damage to the motorcycle thereby obviating the necessity of calling a witness to merely prolong the hearing; and

(3) the appellant plaintiff was never asked whether she could call the repairer of the motorcycle to testify in court and to produce the photographs – a basic requirement of s. 114(g) of the Evidence Act 1950, namely, "evidence which could be and is not produced".

In *Mohamed Ali v. PP* [1962] 28 MLJ 230, Ong J aptly said at p. 231 to p. 232 of the report:

> In drawing presumptions under section 114 of the Evidence Ordinance, 1950, it is to be observed that what the section says is that the existence of certain facts may be presumed which the court 'thinks likely to have happened' in the circumstances of the particular case. Presumptions of fact must not be drawn automatically, or, as it were, by rule of thumb, without first considering whether in the circumstances of each particular case there were adequate grounds to justify any presumption being raised. Even, with regard to presumptions of law, Devlin L.J. said recently in *Berry v. British Transport Commission* [1961] 3 WLR 450, 463.
>
> > ... Presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable – in the sense that 'estoppels are odious', and the 'doctrine should never be applied without a necessity for it'; per Bramwell L.J. *Baxendale v. Bennett* [1878] 3 Q.B.D. 525, 529, C.A. – because they prevent the court from ascertaining the truth, which should be the prime object of a judicial investigation, and because if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own'.

Some years later, Chang Min Tat FJ sitting in the High Court in the case of *Murugan v. Lew Chu Cheong* [1980] 2 MLJ 139, 140 said:

> Lastly, I was asked to draw an adverse inference under section 114(g) Evidence Act, 1950 against the motorist from the failure to call his travel companion as his witness. His explanation was that he did not know her address. This explanation was unchallenged and must therefore be accepted as sufficient to prevent the raising of the inference.

and in the present appeal, the appeal record showed that the trial court was not asked to draw an adverse inference under s. 114(g) of the Evidence Act 1950 against the appellant plaintiff for not calling the repairer of the motorcycle nor for not producing the photographs.

It is salutary to remember that in a contest of any factual dispute in regard to negligence on the road, no party can possibly hope to demolish wholly the other party's version. Each party can only highlight the inconsistencies in the testimony of the opposite party and it is up to the court to examine, decipher and weigh the testimony of both parties and to decide accordingly. For my part, I have read the appeal record and I found that the printed evidence favoured the appellant plaintiff. I have no choice but to allow the appeal by the appellant plaintiff in regard to the issue of liability and I ruled and it was part and parcel of my judgment that the first respondent defendant was wholly

liable as he was the sole author of the road accident. In regard to the issue of liability, I must set aside the order of the trial court and substitute therewith the order that the first respondent defendant was totally to blame for the road accident. This was my judgment and I so hold accordingly.

Quantum

Pain and suffering and loss of amenities.

There were three medical reports on the appellant plaintiff. The first was from Dr. Zahir Husain bin Kamari from the Hospital Sultanah Aminah Johor Bahru dated 29 May 1995 and that medical report was worded in this way:

> Initial Injury Report on:
> Name: Suriyati bt. Takril Age: 41 years.
> Sex: Female I/C: 4576172
> R.N: 17497 O.N: 2243/94
> D.A: 15.4.94 D.D: 20.4.94
>
> This is to certify that the above named was admitted to this Hospital, and the following findings were recorded.
>
> **Clinical Summary:**
>
> History of alleged motorvehicle accident and (she) sustained:
>
> 1. Multiple abrasion wound both legs.
> 2. Closed fracture right medial tibial condyle with closed fracture neck of right fibula.
>
> **Treatment:**
>
> 1. Analgesics and dressing.
> 2. Cylinder POP cast for right lower limb.
>
> **Progress:**
>
> She was discharged well on 20.4.94 with non weight bearing crutches.
> Follow up date: 19.5.94, 16.6.94, 7.7.94, 18.8.94, 8.9.94, 24.10.94 and 23.1.95.

The second medical report came from Ram Orthopaedic Clinic dated 16 August 1995 and it was worded in this way:

> **Re: SPECIALIST MEDICAL REPORT ON SURIYATI BT TAKRIL**
>
> I refer to your letter dated 8th August 1995 and am herewith pleased to provide you with the specialist report on Suriyati Bt. Takril whom I examined on 16 August 1995.

INJURIES SUSTAINED: She sustained the following injuries as a result of a road-traffic accident on 15-04-1994:

1. A closed fracture of right medial tibial condyle.
2. A closed fracture of the neck of the right fibula.
3. Multiple abrasions on both legs.

PRESENT COMPLAINTS: They are as follows:

1. Inability to straighten right knee completely.
2. Crepitations in the right knee.
3. Weakness of the right leg.
4. Difficulty in doing stairs.
5. Difficulty in squatting for more than short periods.
6. Difficulty in sitting on the floor with legs folded as in praying.
7. Difficulty in walking briskly.
8. Pain in cool conditions.

ON EXAMINATION: The following findings were made:

Puan Suriyati is an adult Malay female in satisfactory general health.

SCARS: The following are present:

1. A6 x 4 cm. long hyperpigmented wound scar on the left calf region.
2. Two hyperpigmented wound scars on the outer aspect of the left knee measuring 3 x 3.5 cm. and 4 x 2 cm.

MEASUREMENTS:

UPPER LIMBS: No abnormalities are apparent.

LOWER LIMBS: The following abnormalities are present:

1. The right thigh muscles are wasted by 4 cm.
2. The right calf muscles are wasted by 2 cm.
3. The right lower limb is shortened by 1 cm.

RANGE OF MOVEMENTS: The following findings were made: *a*

UPPER LIMBS: The following were recorded:

JOINTS	AXES OF MOVEMENTS	RIGHT	LEFT
SHOULDERS	Movements in all axes	Full	Full
ELBOWS	Extension – Flexion	Full	Full
	Pronation	Full	Full
	Neutral		
	Supination	Full	Full
WRISTS	Dorsiflexion	Full	Full
	Neutral		
	Palmarflexion	Full	Full
HANDS	Grasp	Grade 5	Grade 5
	Hook	Grade 5	Grade 5
	Pinch	Grade 5	Grade 5

b

c

d

LOWER LIMBS: The following findings were made:

JOINTS	AXES OF MOVEMENTS	RIGHT	LEFT
HIPS	Extension	Full	Full
	Neutral		
	Flexion	Full	Full
	Abduction	Full	Full
	Neutral		
	Adduction	Full	Full
	Internal Rotation	Full	Full
	Neutral		
	External Rotation	Full	Full
KNEES	Extension – Flexion	0 - 140	0 - 155
ANKLES	Dorsiflextion	25	53
	Neutral	0	0
	Plantarflexion	40	50
SUBTALAR	Inversion	Full	Full
	Neutral		
	Eversion	Full	Full

e

f

g

h

i

OTHER PERTINENT ABNORMALITIES: None

X'RAY FINDINGS:

1. **RIGHT KNEE:** There are evidences of a depressed fracture of the lateral condyle of the right tibia.

   This fracture has united but the articular surface of the upper tibia is irregular..

   In fact, the medial condyle of the tibia is also depressed.

   Secondary osteoarthrosis of the right knee joint is present.

   The fracture of the neck of the fibula has united.

DISABILITIES AND OPINION: Puan Suriyati has the following disabilities:

1. **SCARS:** The wound scars acquired as the result of the accident would remain permanent. These scars are hyperpigmented and heaped up. Therefore they are quite unsightly.

2. **MUSCLE WASTING:** Wasting of the right thigh and calf muscles is the result of disuse atrophy which has occurred during the period of healing of the fractures that she sustained.

   The weakness associated with the wasting gives rise to the functional limitations:

   i) difficulty in climbing stairs,

   ii) difficulty in squatting for more than short periods, and

   iii) difficulty in walking.

   Muscle wasting would remain a permanent disability.

3. **SHORTENING:** The 1 cm. shortening is due to the fracture of the right tibia and would remain permanent.

4. **LIMITATION OF JOINT MOVEMENTS:** Flexion in the right knee is restricted to 140 degrees as opposed to 155 degrees in the left. This would give rise to difficulty in sitting on the floor with legs folded at the knee as in praying.

   The right knee is 10 degrees short of full extension. This is due to soft tissue contracture and would improve with time.

   The mild limitation in right ankle movements would improve with time.

5. **SECONDARY OSTEOARTHROSIS:** There are clinical and radiological evidences to support the diagnoses of secondary post traumatic osteoarthrosis involving the right knee.

   The knee is a weight-bearing joint and therefore the osteoarthrosis here would worsen in the years ahead.

6. **PAIN IN COOL CONDITIONS:** Pain in injured parts of the musculoskeletal system in cool condition is a common complaint and is liable to remain permanent.

CONCLUSION: This lady works as an administrative assistant which is a sedentary job.

Since the secondary osteoarthrosis of the right knee is a progressive condition there is a possibility that this lady may require a total knee replacement in the not too distant future.

The cost of this operation at today's prices is about RM11,000.

The third medical report was dated 10 June 1996 and it was from Raj Orthopaedic Surgery and it was drafted in this way:

MEDICAL REPORT ON
SURIYATI BT TAKRIL
Female – 43 years
I.C. No. 4576172

I examined Suriyati, at your request, for a medical report. She was injured in a road accident on 15th April 1994 and suffered injuries as noted in Dr. Zahir's report dated 29th May 1995 (hospital Sultanah Aminah). I have also perused Dr. Ram's report dated 16th Aug. 1995.

She is a clerk in JPJ, Johor.

PRESENT COMPLAINTS

1. WEAKNESS and ACHING PAIN right knee.

- unable to walk or stand for long periods – (feels ache).
- walking quickly or jogging is difficult.
- knee aches at end of the day.
- cannot squat for long periods.
- difficulty kneeling or sitting cross legged for prayer.
- knee ache affects her during sexual intercourse and she cannot enjoy the act.

PHYSICAL EXAMINATION

1. SCARS:

Two scars on outer aspect of left knee measuring 3 x 4cm and 4 x 2cm.

7 x 3 cm scars posteromedial left knee.

6 x 4 cm scar left medial calf.

2. WASTING:

There is a residual wasting of right thigh (3cm) and calf (1cm)

3. MOVEMENTS:

		Right	left
Hip	Abduction	60 degrees	60 degrees
	Adduction	30 degrees	30 degrees
	Internal rotation	25 degrees	25 degrees
	External rotation	70 degrees	70 degrees
	Flexion	140 degrees	140 degrees
	Extension	10 degrees	10 degrees
Knee	Flexion	0-155 degrees	0-155 degrees
Ankle	Dorsiflextion	35 degrees	35 degrees
	Plantarflexion	50 degrees	50 degrees
Subtalar	Eversion	10 degrees	10 degrees
	Inversion	20 degrees	20 degrees

4. RIGHT LEG:

There is no obvious limp. She can squat but complains of right knee pain.

X-RAY EXAMINATION

Depressed fracture of medial condyle of right tibia has united. A localised irregularity of the medial articular surface is noted. X-ray of both legs together reveal 1cm shortening of right leg. (medial joint knee joint to ankle joint).

OPINION

As a result of the accident on 15th April 1994, Suriyati suffered the following injuries and disabilities:

1. Multiple abrasions of the legs – which has left permanent scars as noted.
2. Closed depressed fracture of medial tibial condyle – which has healed with residual depression. There is 1cm shortening of right leg due to impaction of the fracture.

3. The residual ache and weakness of the right knee is due to the localised damage to the medial tibial articular surface. This results in increased friction when she bears weight, causing pain. She is likely to feel knee ache if she excessively stresses the knee (e.g. walking or standing for long periods, climbing stairs or squatting for long periods). She will benefit from anti-inflammatory medication to reduce her present symptoms.

4. The movements of the right knee and ankle has recovered since last seen by Dr. Ram.

5. The damaged articular surface is likely to progress to osteoarthritis of the right knee in future. This will result in increased pain. The possibility of future surgery (e.g. knee replacement) being done in the next ten to twenty years cannot be ruled out.

The cost of knee replacement today is RM11,000.00.

I have perused through the written decision of the trial court, and I found that the trial court had failed to consider the following medical disabilities of the appellant plaintiff.

(1) The main injury sustained by the appellant plaintiff was focussed on her weight bearing joint, to be precise it was the right knee joint. She suffered a fracture of the medial condyle of the right tibia and fracture of the neck of the fibula as reflected in the medical report of Dr. Zahir Husain bin Kamari.

Medically speaking:

(a) The tibia is a weight bearing bone and this is clearly reflected in a book entitled "Courtroom Medical" volume 9 by Kalisch-Williams where the learned author said at para. 2.10:

> The tibia is the strong, massive bone on the inner side of the lower leg. Although another bone, the fibula, is also present in the lower leg, the tibia alone receives the body weight transmitted to it through the femur and conveys that weight to the foot. Except for the femur, the tibia is the longest and heaviest bone in the body, measuring about one-fourth to one-fifth of the length of the body. It extends from the knee joint where it articulates with the lower end of the femur to the ankle where it articulates with the superior surface of the body of the talus, the uppermost bone of the foot.
>
> The tibia is also known as the shin bone and since its anterior border is subcutaneous (*ie*, lying just under the skin) it may be palpated for its entire length from knee to ankle. The shaft of the bone is thinnest at the junction of its middle and distal thirds, and gradually

> expands above and below. It presents three surfaces, being roughly triangular in cross section, and three borders. The surfaces correspond to the sides of the triangle, the borders to the angles. The surfaces are designated medial, lateral, and posterior while the borders are called anterior, medial, and interosseous (between bones). The anterior border, an elongation of the apex of the triangle, is the most prominent of the three borders and forms the shin. The medial border is not as well defined, although it too is palpable throughout its entire length. This internal border is more rounded than the anterior border which in its upper two thirds presents a rather sharp edge. The interosseous border, being covered by muscles, cannot be palpated through the skin.
>
> The tibial shaft is made up of thick compact bone whereas the upper and lower ends are made of cancellous (spongy or lattice-like) bone surrounded by a thin outer shell or cortex of hard compact bone. In overall outline the bone presents a shaft which tapers from the expanded upper end until it approaches the ankle where it again expands.

(b) That the fracture of the tibial condyles is said to be serious. Kalisch-Williams in the same book at para. 10.60 had this to say of this kind of fracture:

> Fracture of the tibial condyles, the most common intra-articular fracture of the knee, is a serious injury and on the whole bears a poor prognosis.

and the learned author later explained:

> Nevertheless, upper tibial fractures constitute serious injuries that often lead to impaired function of the knee and permanent disability.

(c) That the damage to the articular surface of the tibial condyles leads to traumatic arthritis and limits the knee motion and causes pain and certainly there would not be any satisfactory remedy. On these points, Kalisch-Williams in the same book at para. 10.61 had this to say:

> Healing of articular surfaces with irregular contours often follows severe disruption of the knee joint and is likely to lead to traumatic arthritis. This condition limits knee motion and causes pain; there is no entirely satisfactory remedy. Arthroplasty (surgery to reconstruct the joint or provide an artificial joint) though not a well established procedure, is sometimes performed; even when successful, however, arthroplasty usually results in a joint with limited capacity for walking and standing. Another surgical procedure of last resort in eliminating the symptoms of traumatic arthritis is arthrodesis, the permanent fusion of the joint by fastening the tibia and femur immovably together.

(2) According to the medical report from Ram Orthopaedic Clinic, the appellant plaintiff had osteoarthrosis.

(3) According to Ram Orthopaedic Clinic and Raj Orthopaedic Surgery, the appellant plaintiff suffered continuous pain and would require a major surgery in the future for knee replacement.

One may ask what is a knee replacement surgery? It is described in "Hollywood Orthopaedic Service On Total Knee Replacement Information Booklet" as:

> A Total Knee Replacement is an operation designed to replace the knee joint which has been damaged, usually by arthritis. The knee joint is a hinge type consisting of the bottom end of the thigh bone (distal femur) and the top part of the shin bone (tibia). There is a complex arrangement of ligaments surrounding this joint, with special cartilage (meniscus) sandwiched between. The knee cap (patella) sits in the middle of a large tendon on top of the joint for extra protection.
>
> Arthritis occurs when special cartilage that lines the femur and tibia becomes worn away. This can occur all over the joint or in part of the joint. This causes roughening and distortion of the joint, which results in pain and restricted movement.
>
> The total knee replacement operation replaces the worn surfaces with stainless steel on the femur end and special plastic polythene on the tibia end thus allowing for restoration of the 'gliding' surfaces."

(4) According to the two specialists from Ram Orthopaedic Clinic and Raj Orthopaedic Surgery, the appellant plaintiff also suffered a fracture of the fibula with extensive scarring. The fracture of the fibula has healed well but the scars were unsightly – "hyperpigmented and heaped up". As a working lady, the unsightly scars must have been a nightmare to the appellant plaintiff. Even a housewife sustaining such ugly scars after a road accident would feel the same way. Unfortunately, the trial court failed to take this into consideration.

(5) In addition to the existing pain and suffering, the appellant plaintiff has the prospect of undergoing major surgery in the near future which surgery entails more pain and suffering and would expose her to the danger of anesthesia and being bed ridden for some time whilst recovering from surgery.

The trial court awarded RM30,000 under this head. Mr. N. Jegatheeson for the appellant plaintiff suggested a figure of RM37,000 while Mr. Joseph Clemons for both the respondents defendants submitted that the sum awarded by the trial court was quite reasonable bearing in mind the current strength of the ringgit and the possibility of overlapping.

In my judgment, I was satisfied that the trial court made a blunder when it misapprehended the facts and failed to consider the medical disabilities of the appellant plaintiff as alluded to above with the result that the trial court made a "wholly erroneous estimate of the damage suffered" (*Davies v. Powell Duffryn Associated Collieries Ltd* [1942] AC 601 at pp. 616-617 as cited and applied by Wan Suleiman FJ (as he then was) in *Rasidin bin Partorjo v. Frederick Kiai (supra)* and referred to in *Tabarani Mohd Arsad & Anor v. Chan Tenn Yeu (supra)*). I too took into account the element of overlapping when two or more injuries are sustained simultaneously (*Mohamad bin Mohamad Said & Anor v. Perianayagam & Anor* [1972] 1 MLJ 67 FC, 68). Under this head, I ordered and awarded a sum of RM37,000 to the appellant plaintiff on the basis of 100% liability on the part of the first respondent defendant thereby setting aside and varying the award of the trial court under this head. The sum of RM37,000, in my judgment, was fair and reasonable in the circumstances of the present appeal.

I must highlight certain comparables. In *Er Siew Keng v. Eng Thiang Lai* [1990] 1 CLJ 488, for the fracture of the right radius and ulna, a fracture of the shaft of the right femur, a complete disruption of the right knee and a comminuted compound fracture of the right tibia and fibula, Abu Mansor Ali J (as he then was) awarded RM45,000. In *Victor Alphonse Sebastian & Ors v. Lee Ah Leek* [1987] 2 MLJ xxi, the late Mustapha Hussain J awarded RM33,000 for the fracture of the right midshaft femur, laceration on the right knee joint, laceration on the left knee and laceration on the lower jaw. In *Eh Khan Sio Eh Dum v. Choo Chiu Nan* [1981] MMD October [1991], 1193, the deputy registrar of Singapore awarded S$11,500 for injury to left foot and S$4,000 for osteoarthritis of left foot. These comparables served as mere guidelines and at the end of the day it was entirely up to the court to decide the fair and reasonable figure to be awarded. I repeat that the appellant plaintiff was entitled to an award of RM37,000 under this head and I so made that order accordingly.

Cost Of Future Surgery

At the time of preparing the medical reports, the two specialists from Ram Orthopaedic Clinic and Raj Orthopaedic Surgery felt that the cost of knee replacement surgery in a private hospital would be in the region of RM11,000. In the future, the price may escalate even further and I am not prepared to conjecture a figure as there was no available evidence. The appellant plaintiff in her evidence at p. 37 of the appeal record testified that she would like to have the knee replacement surgery done in a private hospital because according to her it could be done fast. The trial court ruled that the surgery in question could be done in the government hospital since the appellant plaintiff is a serving government servant, an administrative assistant in the road transport

department of Johor Bahru, and the trial court even proceeded to say that the appellant plaintiff would be entitled to a free medical treatment at the government hospital.

Was it unreasonable in the circumstances of the present appeal for the appellant plaintiff to seek medical treatment in private hospital for knee replacement surgery? That would be the crucial question of the day and I would willingly answer that question in the negative.

Two authorities must be highlighted as they serve as good guidelines. The first would be *Yaakub Foong Abdullah @ Foong Chin Siew v. Lai Mun Keong @ Lai Mun & Anor* [1986] 1 CLJ 355, where Shankar J (as he then was) On the issue of a treatment in a private hospital had this to say at p. 358 of the report:

> Defence counsel is insistent that the plaintiff should get himself treated in the Government Hospital in Johore Bahru because it is cheaper by half. As to this, it is my view that a claimant is entitled to have himself treated in a private hospital if in all the circumstances that is not an unreasonable thing for him to do.

The second would be the case of *Chong Kam Siong v. Herman Baharuddin* [1995] 2 CLJ 413, 417, 418, where James Foong J gave cogent reasons for the plaintiff to seek medical treatment at a private hospital and this was what he said:

> Relating to the first question and after careful consideration of all the related decisions, I am of the view that the yardstick to determine whether a claimant is entitled to medical expenses expended by him in a private hospital of his choice rather than seeking treatment from a government hospital where it is practically free, is not on whether the government hospital at that material time could or could not provide adequate care and attention to him. To my mind it is most unfair for this Court to determine which hospital is more efficient. Certainly one cannot deny the fact that the Government hospitals are often crowded and overworked but they are providing a practically free service to every one in this country. I am sure that there are also private hospitals that are inefficient and do not provide adequate medical treatment. In my opinion any ordinary citizen of this country has a right to choose medical treatment for his injuries and illness from whoever and from wherever. The only limitations to this freedom are economic and availability factors. Economic in the sense that he may not be able to afford the medical expenses so charged by the medical fraternity in the private sector. Such being the case, many patients have turned to our government hospitals to seek medical treatment mainly because, they are heavily subsidised by the government to a stage where the charges are practically free. As for 'availability', it is a question of whether the particular type of treatment is available at certain medical establishment, be it private or government. Again it is a fact that not all private medical establishments can one find the particular specialist or the equipment to handle such cases, while in a larger general hospital such services are available.

> Applying the aforesaid principle of the freedom of choice, an injured victim in a road accident should also be granted the same right to choose where and by whom he wishes to be treated. When such a patient seeks medical treatment at the material time, his immediate objective is to cure himself speedily. Next in his mind would be whether he can afford such treatment and the availability of medical specialists, equipment and treatment from the establishment he seeks to be admitted. I doubt at that material time, an injured patient in a motor accident would be thinking of the recovery of medical expenses as his first priority in making a decision as to where and by whom he would like to be treated, bearing in mind that again at that material time there is no certainty that he would succeed in his claim for recovery of such expenses. There is also a probability that he may not succeed subsequently in his claim for such expenses and, in such an event he would have to foot the medical bill by himself. Many patients who do not possess economic means would certainly turn to the government hospitals while those who can afford may seek medical treatment at a private hospital of a nature which is more in line with their station in life which they are accustomed to; this of course is based on the assumption that both private and government hospitals have the availability of specialists and equipment to treat his type of injuries.
>
> For reasons aforesaid, I find that the plaintiff in this case in entitled to seek medical treatment other than in a government hospital.

Notwithstanding these two authorities, the trial court awarded a mere RM3,000 under this head and the trial court seemed to have been motivated by the decision of the then Supreme Court in the case of *Pengarah Institut Penyelidikan Perubatan & Anor v. Inthra Devi & Anor* [1987] 2 CLJ 420 where Hashim Yeop A. Sani SCJ dismissed the awards on cost of plastic surgery and cost of psychiatric therapy treatment at a private clinic because those awards were considered as absorbed in Award "A" – referring to the award by the learned judge to the first respondent amounting to RM80,000 as general damages (see p. 20 left hand column at "I" and at p. 21 right hand column at "A" to "C" of the judgment).

It seemed that his Lordship Hashim Yeop A Sani SCJ apparent reason for rejecting the request to go to a private clinic was because there was clear evidence from a government officer in the person of Dr. Lim Teong Wee (DW1) that Inthra Devi would be entitled to a free treatment at a government hospital. Furthermore, the then Supreme Court did not accept that Inthra Devi should be treated at a private clinic based purely on her husband's unhappiness about an incident at a government clinic (see p. 21 left hand column at "I" of the report of the judgment of *Pengarah Institut Penyelidikan Perubatan & Anor v. Inthra Devi & Anor (supra)*). I am of the view, with due respect to the Supreme Court in that case, that the facts there are poles apart from the present appeal. Moreover, the decision of the Supreme Court on this point – whether a victim of a road accident is entitled to seek medical treatment at a private hospital, was a mere *per incuriam*. I say this, with respect, and for the following reasons:

(1) Inthra Devi's claim was against her employer, the government, and her claim was founded in part, at least, on contract. The contract of employment provided for free medical and surgical treatment and the government had provided evidence through Dr. Lim Teong Wee (DW1) that she was entitled to a free medical treatment.

(2) It would not lie in the mouth of the tortfeasor to tell his victim at what cheapest or free institution the victim should seek his treatment in order to alleviate his pain and suffering.

In my judgment, to entitle the victim of a road accident to seek medical treatment at a private hospital the victim in question need only show a semblance of reasonableness. By way of an analogy the case of *Harris v. Brights Asphalt Contractors Ld* [1953] 1 QB 617 may be relied upon. There Slade J at p. 635 of the report said:

> I now come to the question of nursing attendance. Mr. Crichton referred me to section 2(4) of the Act of 1948 which provides 'In an action for damages for personal injuries (including any such action arising out of a contract), there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act, 1946.' I think all that means is that, when an injured plaintiff in fact incurs expenses which are reasonable, that expenditure is not to be impeached on the ground that, if he had taken advantage of the facilities available under the National Health Service Act, 1946, those reasonable expenses might have been avoided. I do not understand section 2(4) to enact that a plaintiff shall be deemed to be entitled to recover expenses which in fact he will never incur. The plaintiff has been in one hospital or another from November 24, 1950, until today, and no claim of any kind is made for special damage in respect of past nursing and attendance. I consider it in the highest degree unlikely that there will be any change in that most desirable position between now and 18 months hence, but as nursing attendance is clearly a justifiable expense if it is incurred, I must have regard not to the probability, but to the possibility that some expense may be incurred under that head during the ensuing 18 months. I think that the possibility is so remote that this head of claim will be adequately met by an award of the sum of 25 pounds.

and the root words seem to be "expenses which are reasonable". The question to pose would be: would a sum of RM11,000 be reasonable expenses for knee replacement surgery which the appellant plaintiff propose to undergo in the near future in a private hospital as quantified and recommended by two private specialists? I would, without hesitation, answer the question posed in the positive. Unlike the case of *Pengarah Institut Penyelidikan Perubatan & Anor v. Inthra Devi & Anor (supra)* where the treatment at the government hospital was a continuing affair and was expected to continue, the appellant plaintiff in the present appeal can only hope to obtain the knee replacement surgery

at the government hospital on the basis of being considered in medical parlance as a "cold or elective surgery" – meaning that her future surgery would not be an urgent or an imperative one but rather it would only be done at the government hospital's convenience and not at the convenience of the appellant plaintiff. Moreover there was no evidence that the appellant plaintiff would remain in the employment of the government until her retirement and in the event she resigns prematurely, she would certainly not be entitled to a free medical treatment at a government hospital. For all these reasons, it would be fair and reasonable to award the sum of RM11,000 to the appellant plaintiff under this head and I so award accordingly. This meant that the award of the trial court under this head would be set aside and varied and in its place a sum of RM11,000 would be awarded to the appellant plaintiff accordingly. This was my judgment and I so hold accordingly.

Conclusion

I allowed the appeal of the appellant plaintiff.

(1) Liability

I held and it was my judgment that the first respondent defendant was wholly liable for the road accident.

(2) Quantum

(a) Pain and suffering and loss of amenities:	RM37,000
(b) Cost of future surgery:	RM11,000

(3) Interest

I awarded interest on item 2(a) at 8% per annum from the date of service to the date of judgment. There would be no interest on item 2(b).

(4) Costs

I awarded costs of the appeal to the appellant plaintiff.

Addendum

By way of an addendum, I must place on record my gratitude to both Mr. N. Jegatheeson of counsel for the appellant plaintiff and Mr. Joseph Clemons of counsel for both the respondents defendants for their forthrightness in conducting this appeal. They both performed marvellously at the bar and it is always a pleasure to have both of them appearing before me, be it in chambers or in open court.